# Petition

81-1510

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

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ATHENS CARL McLAUGHLIN, JR.,

GREGORY THOMAS METOYER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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6 February 1982

## QUESTIONS PRESENTED

1. Was there a denial of Due Process of Law as guaranteed by the Fifth Amendment to the United States Constitution when the United States Attorney knowingly and willfully suppressed from the Grand Jury, the Court, and the defense, the fact that the government's star witness was an admitted perjurer, in face of express trial court findings that this information was material, exculpatory, and necessary to insure a fair trial to defendants.

   A. Was there a denial of Due Process of Law when the trial court conditioned the granting of a mistrial for these violations upon a unanimous request from all five of the co-defendants.

   B. Under the standards of United States v. Berger, did the actions of the United States Attorney in concealing this material and exculpatory information constitute

prosecutorial misconduct which requires a reversal of convictions.

II. Have the most basic and fundamental Due Process rights which are guaranteed to every American citizen by the Fifth Amendment been violated when a man is convicted of a crime and sentenced to ten years in prison based upon a record which is completely devoid of the slightest scintilla of evidence against him.

A. In mass jury trials, does the trial court have a duty and responsibility to provide adequate instructions to the jury which properly compartmentalize the evidence as to individual defendants and individual counts.

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## OPINIONS BELOW

The opinion of the Federal District Court and its judgment were not reported. The opinion of the Federal Court of Appeals for the Sixth Circuit (Appendix A) was not reported.

## JURISDICTION

The order affirming the conviction of appellants was entered in the case on 22 October 1981. A Petition for Rehearing was filed with the Sixth Circuit on 5 November 1981, and the Order Denying said petition was entered on 8 December 1981. The jurisdiction of this Court is invoked under 28 U.S.C Section 2154 .

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

"No person shall...be deprived of life, liberty, or property without due process of law;..."

## STATEMENT OF THE CASE

Petitioners McLaughlin and Metoyer and three other co-defendants were indicted in the Middle District of Tennessee for allegedly conspiring to unlawfully possess and distribute controlled substances in violation of Title 21 United States Code Sections 846 and 841 (a)(1).

In a mass trial before a jury, the Petitioners and the three other co-defendants were tried on nine counts of the indictment. Counts Five, Eight, and Nine, all substantive counts, were dismissed during the trial proceedings. The trial court granted a judgment of acquital as to Count Three during the sentencing proceedings.

Petitioner McLaughlin was convicted of Count One of the indictment, charging conspiracy to distribute a controlled substance, and was sentenced to fifteen (15) years in Federal prison.

McLaughlin was also convicted of three counts charging substantive offenses.

In Count Four he was charged with distributing a controlled substance on 12 September 1974. After conviction, he was sentenced by the trial court to fifteen (15) years in prison, to run concurrently with Count One. In Count Six he was charged with distributing a controlled substance in the Spring of 1975. For this Count he was sentenced to ten (10) years in federal prison, to run consecutive to Counts One and Four. In Count Seven, he was charged with distributing a controlled substance on or about 7 July 1975. For this Count he was sentenced to ten (10) years in prison, to run concurrently with Count Six.

Petitioner Metoyer was convicted of Count One, charging conspiracy to distribute a controlled substance, and was sentenced to ten (10) years in federal prison. He was also convicted of one substantive count, Count Six, charging distribution of a controlled substance in the Spring of 1975, and was sentenced

to five (5) years in federal prison.

As to Petitioner McLaughlin, the trial court imposed a total sentence of twenty-five (25) years in federal prison. As to Petitioner Metoyer, the trial court imposed a total sentence consisting of fifteen (15) years in federal prison.

The governments case consisted primarily of testimony from current felons anc ex-felons who were involved in the alleged transactions. Testimony from all of the witnesses revealed that they had all received substantial benefits in exchange for their testimonies, including thousands of dollars in cash payments, immunity from prosecution in this indictment and in other unrelated prosecutions pending against them, actual reductions of sentences, and better prison facilities.

Ronald McKinley was the star witness for the prosecution. McKinley testified that he first travelled from Tennessee to California in 1975 when he met with

one Jim Patton to purchase heroin. Patton introduced him to an individual named Calvin, who subsequently sold him the narcotics.

With regards to Count Four, McKinley stated that he sent a courier, Don Fleming, to Los Angeles to purchase narcotic drugs. He alleged that he called McLaughlin several times immediately before and after the transaction, however, the telephone long distance records which were specifically introduced by the government to corroborate this testimony did not reveal any phone calls to McLaughlin for any time period even remotely close to this date. Don Fleming, the courier, personally testified and stated that he had never seen McLaughlin before that date. He testified that he did not purchase the narcotics from him. Yet in spite of this evidence, McLaughlin was sentenced to fifteen (15) years in prison for this offense.

McKinley also testified as to the

incidents involved in Count Six. He testified that several days prior to the transaction he called Calvin in California. Under direct questioning by the Court, McKinley testified as follows:

"Q. All right. So, the person you dealt with in that transaction was Calvin. Calvin said he was going to take care of that transaction, right?

A. That's correct.

Q. Now, all right.

BY THE COUPT: Who did you call originally on that transaction?

A. On this particular one?

BY THE COURT: The one he's talking about.

A. Calvin.

BY THE COURT: You called him and he called back then?

A. Yeah."

There was no testimony that McLaughlin ever had any possession of the substance involved, either actual or constructive.

There was no testimony from McKinley, or any other witness, that McLaughlin was involved in, or even knew about, this transaction. On the contrary, the only testimony which was presented on this Count revealed that the sale was made by an unindicted individual named Calvin. Yet, in spite of this direct and specific testimony, and in the absence of any evidence against him, McLaughlin was convicted of this substantive count and sentenced to ten (10) years in prison.

Additionally, this conviction was made in the absence of any proof as to the narcotic nature of the substance involved, even though this is a required element of the offense. The substance itself was not introduced into evidence. There was no court exhibit of the substance nor any testimony of any expert who had analyzed it. Nor was there any testimony from any witness who had sampled the

substance. There was no evidence that high prices had been paid. In this count the narcotic nature of the substance sold was established solely on the basis of the testimony of McKinley that it was bought and sold as a narcotic, without complaint. McKinley had also testified to other instances, however, when substances other than narcotics were bought and sold as narcotic substances.

McKinley testified similiarly with regards to Count Seven, for which McLaughlin received ten (10) years in prison. He stated that Calvin picked him up from the airport and took him to a Marina del Rey hotel where the transaction took place. With regards to this count, there is not one single iota of evidence against Petitioner McLaughlin. His name was not so much as even mentioned by McKinley or any other witness regarding this count. There was no testimony that he knew about the transaction or was involved in it in any way. There

was no testimony or any other evidence that he ever had possession of the substances involved, either actual or constructive.

Yet, in spite of this total dirth of evidence against him, and in spite of Rule 29 Motions to Dismiss, McLaughlin was convicted of this offense and sentenced to ten years in federal prison.

Additionally, there was, again, no proof of the narcotic nature of the substance involved. The substance itself was not introduced into evidence as an exhibit. There was no testimony from any expert witness who had analyzed it. There was no testimony regarding how much was paid. There was no testimony that anyone tested or sampled it. There was no testimony regarding any details of the transaction. There was no testimony regarding customer reaction. The United States Attorney, himself, even admitted at the end of the trial that he had failed to adequately prove this element of the offense.

Approximately two weeks after Ronald McKinley left the stand, and almost at the close of the government's case, it was discovered by the defense, for the first time, that the prosecution had willfully and knowingly suppressed information that McKinley was an admitted perjurer. It was revealed that McKinley had twice before testified, under oath, in two seperate proceedings, that he had never been to California to purchase drugs, and knew nothing about these transactions.

In August of 1977, McKinley had testified in his own trial that he had never been to California to purchase narcotics. It was revealed that Tucker, The DEA agent who was assisting the United States Attorney in the current case had also sat in on McKinley's testimony in the 1977 proceeding. Tucker admitted that he had prior personal knowledge of McKinley's perjury, and he informed the prosecution in the current case of this fact.

It was also revealed that McKinley had again testified in the trial of one Joe Tibbs in 1977 that he had never been to California to purchase narcotics, and that the prosecution knew of this information, also.

The United States Attorney himself admitted that he had been informed of McKinley's previous contradictory testimony and he admitted that he had willfully and knowingly suppressed this information from the Grand Jury, the trial court, and the defense. He admitted that he had willfully suppressed this vital information in spite of the fact that the defense made discovery motions for Brady materials. The prosecutor even went so far as to admit that he tutored his witness regarding how to explain away his perjury, just in case it was discovered by the defense.

At this point in the trial, Petitioners and all of the other defendants made motions for dismissal in light of the deliberate

suppression of exculpatory materials by the prosecution, in face of specific defense requests for such materials.

After hearing full arguments on the issue, the trial court ruled that the information withheld was material, that it was exculpatory, that it was the duty and responsibility of the prosecution to have disclosed it to the defense, and that it had to be disclosed in order to assure a fair trial to the defendants. The trial court then informed the defendants that he would grant them a motion for a mistrial, however, he conditioned the mistrial on the fact that all of the five defendants would unanimously agree to the request for a mistrial. The court then adjourned for the day in order to allow the defendants to confer and decide regarding the mistrial.

The next day the defendants informed the court that there was a lack of unanimity amoung them. Of the five defendants, four wanted to terminate the proceedings, and

only one did not. A request was made for Rule 29 Motions to be heard in order to resolve the conflict, but was denied by the court. After that, all defendants, except one moved for either a mistrial or dismissal, or a combination of the two. All motions were denied by the court, and the trial continued. Ronald McKinley was recalled to the stand for examination regarding this newly discovered information, but none of the other witnesses who had based their testimony on statements and allegations of McKinley were recalled for examination. The proceedings continued, and the Petitioners were convicted as described above.

## ARGUMENTS

### I. The Actions of the United States Attorney in Willfully and Knowingly Suppressing the Material and Exculpatory Information That the Government's Principal Witness Was an Admitted Perjurer Violated the Due Process Requirements of the Fifth Amendment.

There is no question as to the materiality or importance of the information which was withheld. The trial court specifically ruled that the information regarding the past contradictory testimony under oath by McKinley was both material and exculpatory, and that the prosecution was under a duty to both the court and the defense to disclose it. The trial court also specifically ruled that the failure of the prosecution to disclose this evidence had been a denial of a fair trial to the defendants. Therefore, the sole question to be decided is, in light of the magnitude of the prosecutions misconduct, what are appropriate remedies and sanctions for the

violations involved.

Under the standards established by Brady v. Maryland, 373 U.S. 220, 835 S.Ct. 1194 (1963) and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976), the sanctions triggered by a violation of the Fifth Amendment's Due Process provisions vary with the materiality of the suppressed evidence and the "egregiousness" of the prosecutorial misconduct. The greater the misconduct in suppressing the evidence, the less significant the "materiality" becomes. In the case at bar, the evidence was most material and the misconduct highly egregious. Nothing can be more material than evidence that a principal witness has previously testified under oath on two seperate ocassions to the exact opposite of what the prosecution had him testify to in the current trial. Either the witness had committed perjury in the previous trials, or was committing perjury in the instant trial. The testimony did not

deal with an insignificant matter, but concerned the most significant facts of the case.

It is difficult to imagine a more serious act of misconduct than the willful suppression from the defense of evidence which the prosecutor knew was exculpatory of the defendants. The willfullness of of the conduct is magnified by the fact that not only was the prosecutor aware of the prior testimony, but he prepared the witness as to how he should deal with questions should the defense discover or become aware of his prior testimony, and thereby be in a position to cross-examine him on the issue. Thus, the prosecutor allowed the witness to complete his examination, and leave the witness stand without being corss-examined on the prior testimony. The prosecutor was willing to take advantage of the fact that he knew of the prior testimony and defense counsel did not. This not only was a denial of Due Process to the defendants, but was a

fraud upon the court and the judicial process as well.

In Napue v. Illinois, 360 U.S. 264 (1959) and Giglio v. United States, 405 U.S. 150 (1972), this Court established the proposition that where the reliability of a given witness may well be determinitive of guilt or innocence, the suppressed evidence affects that witnesses credibility, and fundamental principals of Due Process are violated by its suppression. There, this Court stated that:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false information and elicit the truth.... That the district attorney's silence was not the result of guile

or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

This Court reversed the convictions of the defendants in both cases.

This philosophy has been followed and applied by courts in all the circuits with regards to the issue of prosecutorial miscondict. In United States v. Kaplan, 470 F. 2 100 (Seventh Circuit 1972), convictions were reversed after it was discovered that evidence going to the credibility of the key witness was suppressed. In Jones v. Jago, 575 F. 2 1164 (Sixth Circuit 1978), the court affirmed a reversal of a state court conviction on a habeus corpus motion because of prosecutorial misconduct in withholding exculpatory evidence.

In United States v. DeMarco, 407 F. Supp 107, (C.D. Cal. 1975), the indictment was dismissed when it was revealed

that the prosecution had failed to disclose exculpatory evidence. This was also the result in United States v. Banks, 383 F. Supp. 389 (D.S.D. (1974).

In the case presently before the Court, the convictions of Petitioners should likewise be reversed on the basis of denial of Due Process of Law.

A. Petitioners Were Denied Due Process of Law When the Trial Court Conditioned the Granting of a Mistrial Upon a Unanimous Request From All Five Defendants.

After ruling on the materiality and importance of the suppressed information, the trial court conditioned the granting of a mistrial on all defendants joining in on the motion. When the court made this ruling, it obviously considered that the prejudice to the defendants was so great that a mistrial should be granted if requested by the defendants. Once having recognized a mistrial as an appropriate sanction, the court's error was in conditioning the grant of a mistrial upon all defendants

joining in said motion.

There could only be two rationales for insisting that all defendants join in a mistrial motion. One rationale is fear by the trial judge that jeopardy has attached, and that in a retrial a defendant could make a plea of double jeopardy. The other rationale is one based upon judicial economy.

The trial court could not possibly have had any fear concerning the jeopardy problem because jeopardy only attaches in those instances wherein a mistrial is granted over the objection of the defendant. See Beasley v. Thomas, 379 F. Supp 1975 (D.C. M.D. Tenn. 1973) wherein the same trial judge who heard this case dealt with the problem of double jeopardy. Any defendant in the instant case, however, under the circumstances of the mistrial motion, would have been unable in a retrial to enter a plea of double jeopardy. In fact, two of the defendants coupled their

motions for a mistrial with a motion for a severance.

Since it is clear that jeopardy would not have attached in the present case,it follows that the only other rationale would have been that of judicial economy. While recognizing the policy of the courts to favor trying defendants jointly for the purpose of judicial economy, this policy should never take precedence over a grant of Due Process rights to a defendant.

The right of a defendant to Due Process of Law is separate and individual as to each defendant not withstanding the fact that several defendants might be tried jointly in a conspiracy action. If the misconduct of the prosecutor substantially affected each defendant's due process rights, the court should never condition the grant of such rights upon what another defendant deems to be in his best interest in waiving the error. The ultimate outcome of this trial is proof

positive of this assertion. The one and only defendant who stated unequivocally to the court that he did not desire to make a motion for a mistrial was acquitted by the jury. Therefore, his judgment to proceed to have that jury to reach a decision, nothwithstanding the prosecutorial misconduct, was a sound one, In that regard, that particular defendant took a gamble. Each defendant had the right, on an individual basis, to have a mistrial granted, nothwithstanding the fact that another defendant was willing to waive prosecutorial misconduct.

It was only <u>after</u> all defendants refused to join in a mistrial motion that the court then made its statement that it believed that the matter could be cured by tending the witness for further cross-examination. The court's judgment in this regard was in error. To be able to recall a witness to the stand two weeks after he had concluded his testimony, and

while several other witnesses had testified in the interim, does not allow defense counsel to be as effective in the examination of that witness as counsel would have been had they been armed with the knowledge of the prior testimony when the witness was first on the stand.

The strategy for cross-examination would have been entirely different had defense counsel been aware of the prior testimony. It may very well be that the very first questions of the cross-examiner would have been to confront the witness with the transcript of his prior testimony, and thus have the jury to immediately believe that the witness was unreliable because of the fact that he was obviously a perjurer. And, in view of the fact that McKinley received substantial benefits from the government in exchange for his testimony, this complete reversal from his former position is highly suspect. McKinley had a very concrete reason for

saying whatever the government wanted him to say in this case, and the jury should have been aware of this substantial bias and its results from the very beginnning. The dramatic impact of this devasting cross-examination material was lost forever to the defendants, and was not recaptured in a recall of the witness.

Secondly, each witness who testified that he went to California with McKinley, or that he went to California on behalf of McKinley, would have been cross-examined differently had defense counsel been aware of McKinley's prior testimony that he had never sold drugs or been to California in connection with the purchase of drugs.

Such opportunities were lost once those witnesses left the stand, and the trial court did not allow the recall of any of these witnesses. Had this suppressed evidence of prior testimony been available to the defense at the time the witnesses were first testifying, it would have been

a valuable weapon in defense counsel's arsenal for cross-examination. This was a weapon that had been deliberately removed from the defense by the prosecutions misconduct.

Notwithstanding the fact that these defendants were not only jointly tried, but charged with the same conspiracy as well, each defendant, nevertheless had a right to be afforded individual Due Process rights. As was said by this Court in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 1247 (1943), "Guilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application."

Each defendant had a constitutional right to a trial free of such blatant prosecutorial misconduct as the willful suppression of Brady material. Therefore each defendant had the right to exercise the perogative of a mistrial motion, regardless of what another defendant

might have done. Due Process demands a reversal of the convictions.

B. Under the Standards of United States v. Berger, it is the Duty of This Court to Reverse the Petitioner's Convictions in Order to Maintain the Integrity of the Criminal Justice System.

The power to reverse a conviction in the face of serious misconduct on the part of the prosecution derives not only from the Due Process requirements of the Fifth Amendment, but also from the exercise of the Court's inherent supervisory authority and responsibility to monitor the administration of justice and to maintain the integrity of a criminal trial in the federal courts. The Supreme Court established this basic and fundamental principal as far back as 1935 when it ruled that the United States Attorney has an obligation, as a servent of the law, to refrain from any tactics which are prejudicially unfair:

"He may prosecute with earnestness

> and vigor--indeed he should do so. But while he may strike hard blows, he may not strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just conviction." Supra, at 88.

The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. Berger, supra, at 88.

In the instant case, in addition to the fraud involved in the hiding of the fact that McKinley was a perjurer, the United States Attorney also made numerous improper and prejudicial statements during the closing arguments. At one point, he stated that "the government doesn't have to introduce--the court will instruct you

that the government doesn't have to introduce every record that may be available. If the government were to introduce every record that was available in this case, we would need another jury room to get them all in here." The defense, at this point, immediately objected before the prosecutor could say any more. A motion for mistrial was made on the basis that the United States Attorney had so flagrantly violated the fundamental requirement that closing arguments cannot refer to evidence that is not in the record. This motion was denied by the trial court.

At another key point in the trial, the United States Attorney made the statement to the jury: "If you will consider the facts of this case, ladies and gentlement of the jury, you will find Mike McLaughlin and Mr. Sloan and his associates guilty of these charges in the indictment. But if you do not believe, ladies and gentlemen of the jury, that the

government has proven its case beyond a reasonable doubt, then you just let Mr. McLaughlin and his associates just go back to California and go about their business. Thank You."

This closing statement was made in direct violation of the Sixth Circuits own interpretation of the types of tactics which are impermissable under Berger. That circuit has reversed cases on numerous ocassions for identical violations. See, United States v. Baker, 553 F. 2d 1017 (Sixth Circuit 1977) ("I submit to you that if you can't take this evidence and find these defendants guilty on this evidence, then we might as well open all the banks and say 'Come on and get the money, boys, because we'll never be able to convict them.'"), United States v. Wiley, 534 F. 2d 659, 665 (Sixth Circuit 1976) ("If this man goes free you have chalked up one point for the criminal."). United States v. Bess, 593 F. 2d 749 (Sixth

Circuit, 1979) ("It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted."). United States v. Toney 599 F. 2d 787 (Sixth Circuit 1979).

At another key point, the United States Attorney clearly misstated the evidence with regards to the individual named Calvin, who was involved in many of the transactions. He said "I will tell you why she didn't know Calvin's last name, ladies and gentlemen of the jury, because Calvin is a John Doe in this lawsuit. The government can't find Calvin, because he is a John Doe. No one knows his last name. He can't be identified." The defense again immediately objected, but was again overruled. This is a key point because throughout the trial, the government attempted to incriminate the defendants through the activities of Calvin who was

a central figure in a substantial number of the transactions.

The trial court overruled the objections which the defense made to each of these improper statements, and denied their motions for mistrial. The court ordered the prosecutor to apologize for the misstatements and to inform the jury that they were not true. These measures were clearly inadequate to cure the harm involved, however, because, as discussed below, these transgressions were multiplied and compounded to the point where the jury was totally misguided and, and, as a result, convicted one of the Petitioners of crimes for which there is not one shred of evidence involving him or incriminating him.

It is this very fact which stands as the most basic and irrefutable proof that the defendants were denied a fundamentally fair trial. The misconduct of the prosecutor permeated the entire

proceedings from the beginning to the end. It began when the United States Attorney knowingly and intentionally concealed the perjury of Ronald McKinley from the Grand Jury, from the trial court, and from the defense. It continued throughout the trial during which the trial court had to admonish the prosecutor on numerous ocassions not to engage in improper behavior. It culminated with the closing arguments of the prosecution which repeatedly violated the Constitutional standards established by the Sixth Circuit itself through a series of cases on the direct point of prosecutorial misconduct.

The case before this Court today raises questions of profound Constitutional significance. In his zeal to strike a blow against the evils of the narcotics trade, the United States Attorney knowingly and deliberately trampled over the most basic Constitutional rights which are guaranteed to each and every American citizen. As a result, the integrity of the judicial

system has been seriously compromised. This judgment of the trial court, if allowed t stand, will condone the use of perjurious testimony as the basis for convictions. It will condone the right of the United States Attorney to hide vital and material information from the Grand Jury, from the defens and from the court itself. It will condone the right of the United States Attorney to make flagrant and repeated misstatements of facts during closing arguments. It will condone the abrogation by the courts of their obligation to maintain the integrity of the criminal process. It will condone the destruction of the Bill of Rights.

The actions of the prosecution in this case constitute a cancer on the American system of justice. Such a cancer is beyond cure, especially by the inconsequential remedies allowed by the trial court. The only remedy is to remove the cancer. The United States Attorney must be made to realize that if he choses to so insult

the integrity of the judicial process, then he must run the risk of reversal of the convictions. To do less would be an abrogation of this Courts responsibility to maintain a fastidious regard for the fair administration of justice.

II. Petitioner's Most Basic and Fundamental Due Process Rights Which are Guaranteed By the Fifth Amendment were Violated When He Was Convicted of Offenses Based Upon a Record Devoid of Evidence Against Him.

The Fifth Amendment to the Constitution provides that no person shall be deprived of life or liberty without Due Process of Law. Most basic and fundamental to this concept is the principal that no person can be convicted of an offense except upon proof by the state of the essential elements of the charge against the defendant.

Petitioner McLaughlin, in this case, was convicted of three counts involving the substantive violation of distributing a controlled substance.

In each of these substantive counts, knowing and intentional possession of the controlled substance involved was an essential element of the crime. Proof of possession must be made as to each of the incidents involved in each of the seperate counts, and the lack of proof of an essential element for one count will require reversal as to that given count. United States v. Graham, 464 F. 2d 1073 (Seventh Circuit 1972).

In Count Seven, McLaughlin was convicted of distribution of a controlled substance on or about 7 July 1975. YET IN THE ENTIRE RECORD THERE IS NOT ONE SINGLE PIECE OF EVIDENCE OR WORD OF TESTIMONY WHICH INVOLVES McLAUGHLIN IN THIS INCIDENT. To convict a man of a crime where there is not the slightest scintilla of evidence against him is the anathema of justice under any standard.

In a review of those federal cases

cases which have been decided on the issue, there is not one single case, from the many cited, which establishes the principal that possession may be established in the total lack of evidence against the defendant.

The same infirmity exists in the defendants conviction on Count Six. In that incident, McKinley testified specifically, under direct questioning from the court, that he called for and negotiated exclusively with Calvin on this transaction. Again, no court has ever held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person. United States v. Landry, 257 F. 2d 425 (Seventh Circuit 1958).

Again, the same is true as to Count Four where the tangible and physical evidence of telephone toll bills and the

actual testimony of an eye witness indisputably established that McLaughlin was not the individual involved in the transactions.

It is patently clear that the Petitioner in this case has been denied those basic Constitutional protections which are mandated by the Fifth Amendment. To convict a person of a crime solely upon the accusation of a prosecutor is abhorrent to every principal that free men have revered since the Magna Carta. What has been allowed to take place in this case is nothing short of a bastardization of our American system of justice: What was once a nation of laws is now openly becoming a nation of men. Men are no longer proven guilty according to the law, but now according to the accusations of other men.

To refuse to reverse the convictions of the Petitioner in this case would be to undermine those Constitutional protections

which are guaranteed to every American citizen, and would stand as a threat to the ideals of liberty and reasoned justice which are fundamental to this democracy.

A. The Jury Instructions Which Were Provided By the Trial Court Were Constitutionally Inadequate to Protect Individual Rights In a Mass Trial.

With regards to each of these substantive counts, there is absolutely no evidence that McLaughlin actually possessed the substances substances involved. Possession may be proven by circumstancial evidence, but when this is done, it then becomes the duty and responsibility of the trial court to assure that the proof is individualized and compartmentalized, defendant by defendant, and count by count. When this responsibility is not carried through, it then becomes the duty of the appellate courts to act. United States Bufalino, 285 F. 2d 408 (Second Circuit 1960). The courts have recognized

that it is a "naive supposition" to believe that jurors can properly amass the voluminous evidence which is often involved in such cases, and have acknowledged there is a special danger that they will substitute a feeling of collective culpability for a finding of individual guilt. Bufalino, supra, at 417.

In United States v. Agueci, 310 F. 2 817 (Second Circuit 1962), the appellate court directly addressed this particular issue. There, as here, the trial court was faced with the responsibility of handling a mass conspiracy case which also charged the defendants with substantive violations of law. The appellate court there held that in such a situation it was the duty of the trial court judge to provide the jury with instructions which individualized and compartmentalized the evidence, defendant by defendant and count by count:

> "In a trial of this dimension, each juror is faced with a difficult task

in compartmentalizing the evidence with regard to each particular defendant and keeping clearly in in mind the full circumstances of each transaction. It is the function of the judge, in his instructions to the jurors, to marshal the evidence that they have seen and heard presented so that justice may be meted out to the individual rather than to the group. Our concept of criminal responsibility, like our concept of moral responsibility, is rooted in the individual, his intentions, his motives, and his conduct. The trial judge, therefore, has the burden of impressing upon the jury the need for judging each defendant separately upon each separate substantive count charged in the indictment. Supra at 829.

The court there reviewed the jury charge involved and found that the trial

judge had specifically instructed the jury as to seven different categories of circumstantial evidence which were relevant.

A review of the current case, however, reveals no such charge. The trial court here discussed circumstantial evidence and the need to consider each count seperately as to each defendant in an abstract manner only. He did not make any attempt whatsoever to specify which evidence was relevant to which count.

It seems clear that, under the standards of both Bufalino and Agueci, the judges charge to the jury in this case was totally inadequate. This charge was specifically objected to by the defense on two seperate occassions. It is also apparant that, as a direct result of this inadequacy, the Petitioner suffered irreparable harm in that he was convicted of counts in the indictment when there was insufficient evidence as to the required elements of those offenses.

## CONCLUSION

The case which stands before the Court today has a special significance and importance which far exceeds the fate of these individual defendants, for what we have here is a hole in the dyke of our Constitutional foundation. The truth of the matter is that because the very word "heroin" strikes a repulsive chord throughout our society, the courts must be exceptionally careful themselves not to exhibit a visceral reaction. Under the guise of public morality and law and order, the prosecution in this case has been allowed to engage in conduct which seriously corrupts the integrity and legitimacy of the judicial system, and which stands as a threat to the Constitutional protections which are supposedly guaranteed to every American citizen. It is now up to this Court to make the final determination whether such misconduct will be condoned or sanctioned.

It has been said that the quality of

justice within a society is measured not by how it treats its best citizens, but by how it treats its worst. To deny any American citizen, no matter how great his crime, his basic Constitutional rights to a fair trial is a threat to all Americans.

The record is clear here that because of the continual pattern of misconduct on the part of the prosecution, the most fundamental principals of the American judicial system have been violated. It is appropriate that, in conclusion, the Court be referred to the comments in the case of United States v. Banks, supra, at 397:

> "This court is mindful of the heavy responsibility that it bears in our criminal justice system. It is unquestionably essential to our society that our laws be enforce swiftly and surely. This court also believes, however, that our society is not bettered by law enforcement that, although it may

be swift and sure, is not conducted in a spirit of fairness or good faith. Those who break our laws must be brought to account for their wrongs, but it is imperative that they be brought to this accounting through an orderly procedure conducted in the spirit of justice. This court's first duty, then, is to insure that our laws are fairly enforced, or as Mr. Chief Justice Warren aptly put it: '(our duty) is to see that the waters of justice are not polluted.' Mesarosh v. United States, 352 U.S. at 14."

Respectfully Submitted,

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Nos. 79-5195/6, 5198, and 5245

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

ATHENS CARL McLAUGHLIN
GREGORY THOMSA METOYER
SAMUEL PATRICK TOUCHARD
ERIC M. TOUCHARD

Defendants-Appellants.

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ORDER

Before: WEICK, and ENGEL, and PECK

All four defendants were convicted of cnunt one of a nine-count indictment charging them with conspiracy to distribute heroin between early 1973 and July 1977, contrary to 21 U.S.C. Sections 843 and 846. Defendant McLaughlin was convicted of counts 4, 6 and 7, charging him with possession with intent to distribute and distribution of heroin during certain periods of time

within the period of conspiracy. Metoyer was also convicted of Count 6. Defendants raise a number of issues in common and certain defendants, particularily McLaughlin, challenge the adequacy of the evidence supporting their conviction of the substantive charges.

Upon a careful review of the record as a whole, the court is ofthe opinion that the government properly charged and proved a single criminal conspiracy involving the sale and distribution of heroin between California and Tennessee and that the involvement of each defendant in that conspiracy was sufficient to support his conviction on that count. The court also finds sufficient evidence to support the conviction of McLaughlin on the substantive charges of Counts 4, 6, and 7, and to support Metoyer's conviction of Count 6.

The court is further of the opinion that there was no fatal variance between between the proofs and the allegations in

the indictments.

The defendants charge several instances of prosecutorial misconduct. Their primary misconduct claim is based on Brady v. Maryland, 373 U.S. 83 (1963). In particular, they claim that the government prosecutor deliberately withheld information known to him but not to the defendants that a key government witness, one McKinley, had in previous criminal trials denied the sale of drugs or having ever been to California for the purpose of buying drugs. This previous testimony was flatly contradicted by McKinley's testimony in this case. The information came to light late in the trial and United States District Judge L. Clure Morton, after considering the matter, denied the several motions for mistrial and for dismissal of the indictments for misconduct. While it is true that Judge Morton initially offered to grant a new trial upon the condition that all defendants consent thereto, it is apparent

from the record that his ultimate decision to continue on in the present trial was based upon his conclusion that the Brady violation was curable. He permitted cross-examination, offered any necessary adjournment of the trial for counsel to investigate and gave strong curative instructions to the jury, all of which we conclude were adequate to cure the taint of the government misconduct. See United States v. Enright, 579 F. 2d 980, 989-90 (6th Cir. 1978).

The court has carefully examined the other allegations of prosecutorial misconduct and concludes that while the conduct of the prosecution at times left much to be desired, at no time did it rise to the level of reversible error or to deny any defendant the essentials of a fair trial. Moreever, Judge Morton's curative instructions substantially weakened the overall effect of the prosecutor's indiscretions.

In the course of the execution of

of a search warrant of the apartment allegedly occupied by Eric Touchard, the government seized a paper containing 32 names, each with a number beside it. This seizure, the defendants assert, was outside the scope of the warrant. Defendants also dispute the government's claim that the exhibit was in "plain view", thus making the seizure lawful under that exception to the warrant requirement. See Coolidge v. Truitt, 521 F. 2d 1174 (6th Cir. 1975). Plaintiffs' reliance upon United States v. Gray, 484 F. 2d 352 (6th CIR. 1973), is misplaced because the search warrant in question here, which called for the search and seizure of evidence indicating ownership and possession of the apartment, justified the closer inspection (sic. in the dresser drawer) which led the officers to reasonably conclude that they had discovered an incriminating document. The defendants claim that this exhibit was not sufficiently authenticated is also without

merit.

The defendants claim that the aforementioned errors singly and particularly in combination produced a trial such as that which had been the concern of the United States Supreme Court in Kotteakos v. United States, 328 U.S. 750 (1946); Krulewitch v. United States, 336 U.S. 440, 445, (1949) (Jackson, J., concurring), and tha each defendant was denied the right to have his own involvement and evidence thereto separately considered. The court is of the opinion that the trial, while long, was not basically unfair and that Judge Morton's goverance of it avoided the errors of those cases. In addition, the court finds no reversible error in Judge Morton's instructions to the jury.

Each of the four defendants, McLaughlin, Metoyer, Eric and Sam Touchard, received a special parole term of three years as part of his sentence for the conspiracy conviction. Each sentence was imposed prior to the United

States Supreme Court's decision in Bifulco v. United States, 447 U.S. 381 (1980). As the government concedes, Bifulco requires that the special parole term aspect of each defendant's conspiracy sentence be vacated. Accordingly,

IT IS ORDERED that each defendant's sentence is vacated and the cause remanded to the district court for resentencing in accordance with this order. The judgment of the district court in each appeal is affirmed in all other respects.

ENTERED BY ORDER OF THE COURT